No. 03-510

In the Supreme Court of the United States

PAT BARBER,
Petitioner,

v.

TEXAS DEPARTMENT OF TRANSPORTATION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Texas Supreme Court majority erred in concluding that the Texas Highway Beautification Act can be applied, consistent with the First Amendment, to prohibit Petitioner from engaging in political speech on a billboard on his own property.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

I. The Sign 1

II. The Texas Highway Beautification Act 2

Summary of the Argument 4

Argument 5

I. The Petition Fails to Demonstrate a Conflict for the Court to Resolve 5

II. Barber's Claim Is Moot Because He Has Voluntary Removed, and Never Re-erected, the Sign That Is the Source of Controversy 9

III. The Texas Supreme Court's Decision Was Correct .. 11

Conclusion 13

TABLE OF AUTHORITIES

Cases

Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33 (CA1 1996) 7

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 10

Barber v. Tex. Dep't of Transp., 49 S.W.3d 12 (Tex. App.—Austin 2001), *rev'd*, 111 S.W.3d 86 (Tex. 2003) 1-2

Boag v. MacDougall, 454 U.S. 364 (1982) 5

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 10

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 11

Matthews v. Town of Needham, 764 F.2d 58 (CA1 1985) 7

Metromedia v. City of San Diego, 453 U.S. 490 (1981) ... 6, 12

Murphy v. Hunt, 455 U.S. 478 (1982) 10, 11

Nat'l Adver. Co. v. Town of Babylon, 900 F.2d 551 (CA2 1990) 7

O'Shea v. Littleton, 414 U.S. 488 (1974) 10

Renne v. Geary, 501 U.S. 312 (1991) 10

Wheeler v. Commissioner of Highways,
822 F.2d 586 (CA6 1987), *cert. denied*,
484 U.S. 1007 (1988) 6, 7

Whitton v. City of Gladstone, 54 F.3d 1400
(CA8 1995) 7

Rules, Statutes & Constitutional Provisions

23 U.S.C. §131 2

23 U.S.C. §131(a) 2

23 U.S.C. §131(b) 2, 4

23 U.S.C. §131(c) 4

23 U.S.C. §131(d) 4

23 U.S.C. §131(t) 2-3

23 U.S.C. §136 2

23 U.S.C. §319 2

S. CT. R. 10 ..... 5, 8

TEX. TRANSP. CODE §391.001(10) 3

TEX. TRANSP. CODE §391.001(5) 2

TEX. TRANSP. CODE §391.002(a) 2

TEX. TRANSP. CODE §391.002(b)(1) 2

TEX. TRANSP. CODE §391.002(b)(2) 2

TEX. TRANSP. CODE §391.005 4

TEX. TRANSP. CODE §391.031(a)(1) 3

TEX. TRANSP. CODE §391.031(a)(2) 3

TEX. TRANSP. CODE §391.031(b) 4

TEX. TRANSP. CODE §391.034(b) 1

STATEMENT OF THE CASE

This case concerns an as applied, First-Amendment-based challenge to the Texas Highway Beautification Act (THBA) arising from the placement of a sign on the Petitioner's non-residential, rural property. The case is splitless, and Petitioner asks merely for error correction. The decision of the Texas Supreme Court is correct, and there are significant vehicle problems with the case because Petitioner has voluntarily removed the sign in question, leaving nothing to sustain a controversy.

I. THE SIGN.

The genesis of this suit is a billboard bearing the statement, "Just say NO to searches," installed in 1997 by Pat Barber, an attorney, on a strip of non-residential property adjacent to Interstate 20 in Mitchell County, Texas. *See* Pet. App., at 4a. Barber failed to apply for a license to display the sign, which was within 660 feet of the right-of-way in a rural area and which admittedly did not qualify for any of the THBA's exemptions. *See id.*, at 45a. The Texas Department of Transportation (TxDOT), which is charged by law with enforcing the THBA, TEX. TRANSP. CODE §391.034(b), sent Barber written notice that the sign violated the THBA and requested its removal. *See id.*, at 5a.

In response, Barber filed this lawsuit, seeking injunctive relief and a declaratory judgment that the THBA is unconstitutional. *Id.*, at 6a. The State filed a counterclaim seeking to enforce the THBA. *Id.* The trial court granted the State summary judgment, held that the THBA is constitutional under the Texas and United States Constitutions on its face and as applied to Barber, enjoined Barber from displaying the sign, and awarded the State attorneys' fees and costs. *See id.*, at 45a. Prior to judgment, Barber voluntarily removed his sign. *See* App. 2a-3a, 7a. On appeal, Barber argued that the THBA as applied to his sign was unconstitutional. The state court of appeals reversed and held that the THBA as applied to Barber violated the First Amendment of the United States Constitution. *Barber v. Tex. Dep't of Transp.*, 49 S.W.3d 12, 25

(Tex. App.—Austin 2001), *rev'd*, 111 S.W.3d 86 (Tex. 2003). Two years later, the Supreme Court of Texas reversed and rendered judgment for the State. *See* Pet. App., at 1a-2a.

II. THE TEXAS HIGHWAY BEAUTIFICATION ACT.

Like similar statutes across the nation, the THBA was passed in response to the Federal Highway Beautification Act, which requires States to "effective[ly] control" outdoor advertising in areas adjacent to interstate and federally funded state highways or forego ten percent of their federal highway funds. 23 U.S.C. §131(b). The federal act seeks to curb the proliferation of billboards along the nation's highways and to "protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. §131(a).

The express purpose of the THBA is to comply with the federal law: "[I]t is the intent of the legislature to comply with the Highway Beautification Act of 1965 (23 U.S.C. §§131, 136, 319) to the extent that it is implemented by the United States Congress. This chapter is conditioned on that law." TEX. TRANSP. CODE §391.002(a). Consistent with the federal law, the purpose of the THBA is to "promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public," and to "protect the public investment in the interstate and primary systems." *Id.* §391.002(b)(1), (2).

To accomplish these objectives, the THBA prohibits "outdoor advertising" in a limited protected area along interstates and federally funded state highways: either (1) within 660 feet of a right-of-way if the advertisement is visible from the interstate or primary highway system,[1] or (2) if outside an urban area, more than

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1. The definition limits the THBA's coverage to federally funded highways in Texas. *See* TEX. TRANSP. CODE §391.001(5); 23 U.S.C.

660 feet from the right-of-way, but visible from the highway and erected for the purpose of having its message seen from the highway. *Id.* §391.031(a)(1), (2). "Outdoor advertising," is defined as:

> an outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to *advertise or inform* if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system.

Id. §391.001(10) (emphasis added). By including the terms "advertise or inform," the definition applies to both commercial and noncommercial signs. The THBA restricts advertising only along this federal corridor. It does not apply to any other locations in the State.

In compliance with federal directive, the THBA exempts from regulation:

> (1) directional or other official outdoor advertising authorized by law, including advertising pertaining to a natural wonder or a scenic or historic attraction;
>
> (2) outdoor advertising for the sale or lease of the property on which it is located;
>
> (3) outdoor advertising solely for activities conducted on the property on which it is located;
>
> (4) outdoor advertising located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:

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§131(t).

(A) is designated industrial or commercial under authority of law; or

(B) is not designated industrial or commercial under authority of law but the land use is consistent with an area designated industrial or commercial;

(5) outdoor advertising that has as its purpose the protection of life and property; or

(6) outdoor advertising erected on or before October 22, 1965, that the commission, with the approval of the secretary of the United States Department of Transportation, determines to be a landmark of such historic or artistic significance that preservation is consistent with the purposes of this subchapter.

§391.031(b); *see also* 23 U.S.C. §131(b), (c), (d) (federal directive).

In addition, the THBA exempts signs solely for and relating to a public election if the sign:

(1) is on private property;

(2) is erected not earlier than the 90th day before the date of the election and is removed not later than the 10th day after the election date;

(3) is constructed of lightweight material; and

(4) has a surface area not larger than 50 square feet.

Id. §391.005.

SUMMARY OF THE ARGUMENT

The Court should decline to grant a writ of certiorari for three reasons. First, no conflict exists between the Texas Supreme Court's decision and decisions of other state supreme courts or federal courts of appeals on the particular issue in this case. In fact,

the only circuit court decision addressing a similar statute upheld that statute's constitutionality. Absent a conflict among courts, Barber essentially asks the Court to engage in error correction, an exercise that does not justify the Court's certiorari jurisdiction. Second, Barber's suit is moot because he voluntarily removed his sign at the outset of the litigation and because his case does not fit any exception to the mootness doctrine. Finally, the Court should deny the writ because the Supreme Court of Texas properly concluded that the Texas statute comports with the First Amendment.

ARGUMENT

I. THE PETITION FAILS TO DEMONSTRATE A CONFLICT FOR THE COURT TO RESOLVE.

In his petition, Barber fails even to allege a conflict between the decisions of the Texas Supreme Court and federal circuit courts or other state high courts as a basis for granting certiorari. He does not argue that there is a conflict over the constitutionality of state statutes enacted pursuant to the FHBA. He does not contend—much less demonstrate—that another relevant court would have reached a different decision than the decision below when presented with the same facts. Rather, he argues merely that the Supreme Court of Texas "misapplie[d] the law for determining whether a restriction on speech is content-based" and "undervalue[d] Petitioner's right to engage in core political speech on his own property." Pet., at 5. But an allegation of a single misapplication of the law simply does not satisfy the Court's prerequisites for review. *See* S. CT. R. 10. Despite the fact that "this Court is not a forum for the correction of errors," *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting), that is precisely the task that the petition requests the Court to perform.

Although Barber argues, as a general proposition, that the multiple opinions in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), have led to disparate decisions among the lower courts, *see* Pet., at 5-6, 19, he merely cites a string of cases with no discussion of their facts or holdings and no explanation of why they allegedly conflict with the Texas Supreme Court's decision in this case. The most Barber can say about this group of cases is that it demonstrates "disparate directions in applying the First Amendment to billboards," *id.*, at 19, a "conflict" of such generality that it does not bear on Barber's question presented. Far from establishing a conflict between the Texas Supreme Court's decision and a decision of a relevant court striking down a substantially similar statute, Barber alleges only that lower courts have generally applied the Court's *Metromedia* decision both narrowly and broadly. *Id.*, at 19. Barber's observation does not even come close to demonstrating that, if presented with the same facts, a federal circuit court or state high court would reach a different conclusion than the one reached by the Supreme Court of Texas. If all that were necessary to show a conflict were one decision upholding and one decision invalidating a restriction of some type on a billboard somewhere, with no similarity of statute and facts, then every billboard case—or every First Amendment case regarding any means of communication—would be appropriate for certiorari.

Not surprisingly, when Barber's cases are examined, it is apparent that they do not support a genuine conflict. Only one of the decisions, *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (CA6 1987), involves a similar statute and circumstance, and that case does not demonstrate any division in the lower courts. Rather, the Sixth Circuit, like the Texas Supreme Court in this case, *upheld* Kentucky's Billboard Statute, which was also enacted pursuant to the Federal Highway Beautification Act and is almost identical to the THBA. Thus, far from being in conflict, *Wheeler* is entirely in agreement with the decision below.

The Court declined certiorari in *Wheeler,* 484 U.S. 1007 (1988), and no conflict has arisen since then that make this issue any more worthy of the Court's review. Indeed, Petitioner has been unable to point to even a single case—state or federal—striking down a state highway beautification act on First Amendment grounds.

Moreover, the cases identified by Barber all concern statutes wholly distinct from the THBA, making them insufficient to support a conflict. The THBA permits signs related to onsite activity (without regard to whether the activity is commercial or non-commercial), offsite signs in industrial or commercial areas, and various other types of offsite signs. *See* Pet. App., at 70a-71a. By its terms, therefore, the THBA does not ban all offsite signs. *See id.* Yet all but one of Barber's cited cases striking down billboard restrictions concern *total* bans on offsite billboards. *See Matthews v. Town of Needham*, 764 F.2d 58, 59-60 (CA1 1985); *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 34 (CA1 1996); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 554 n.1 (CA2 1990). In contrast, the THBA permits many categories of offsite signs. *See* Pet. App., at 70a-71a. The fact that other courts have held that *total* bans on offsite billboards violate the First Amendment sheds no light on whether those courts would also hold that a more narrow ban is unconstitutional, nor do they suggest that the Texas Supreme Court was incorrect in deciding that the THBA's limited ban is constitutional. Thus, these decisions demonstrate no conflict.

The single case Barber cites that did not concern a total ban on offsite billboards addressed a restriction directed solely at political speech. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1402 n.2-4 (CA8 1995) (overturning restriction on election signs). *Whitton* did not address the onsite/offsite distinction or the subject-matter exceptions that are at the heart of this case; thus, it likewise does not conflict with the decision below.

Because no genuine conflict exists with regard to the decision below, nor any important and unsettled question of constitutional law, the Court should deny certiorari. *See* S. CT. R. 10. Even if Barber were correct that this case presents an important issue of constitutional law, then it surely would recur again in another context. The fact that Barber can point to no decision, state or federal, invalidating any state highway beautification act—despite the existence for decades of many such state states pursuant to the federal Highway Beautification Act of 1965—powerfully refutes Barber's claim that this case presents an important and recurring issue of constitutional law.

At a minimum, the Court should allow the issue to percolate and wait until a conflict does develop before granting review. To grant review now, as Barber urges—before any federal court of appeals or state supreme court has heard and accepted a First Amendment challenge to a state highway beautification act—would be premature. With the passage of time, three outcomes are possible: first, given the paucity of reported cases challenging these laws over the past four decades, no further decisions could issue; second, additional federal courts of appeals and state supreme courts could consider the issue and agree with the Texas Supreme Court; or third, a conflict could develop, and other courts could write opinions explaining their reasoning for questioning the constitutionality of state highway beautification statutes. In the first two instances, the issue would not merit this Court's consideration, and, in the third, the Court would have the benefit of the analysis of the lower courts before deciding whether to grant review. In short, if the issue does not recur, it is not important, and if it does, then the Court should wait for a conflict before considering the question.

Accordingly, because there is no conflict in the courts of appeals or the state supreme courts, and because a conflict is unlikely to arise, the Court should deny certiorari.

II. BARBER'S CLAIM IS MOOT BECAUSE HE HAS VOLUNTARY REMOVED, AND NEVER RE-ERECTED, THE SIGN THAT IS THE SOURCE OF CONTROVERSY.

Additionally, a significant vehicle problem strongly counsels against granting certiorari: Barber's suit challenging the THBA became moot when he voluntarily removed his sign prior to any order of the district court that he do so. Contrary to subsequent statements he has made, Barber admitted in his trial-court pleadings that he voluntarily removed his sign on November 4, 1999—prior to the court's summary judgment order—because TxDOT had declined to postpone any enforcement action to remove the sign pending appeal. App., at 2a-3a, 7a. Any intention Barber might have to erect the billboard again cannot revive his suit after it has been moot for over four years.[2]

Moreover, and critically, there is no evidence that Barber made any attempt to raise the billboard anew during the *two-year* interval between the state appeals court's decision, which was favorable to Barber, and the Texas Supreme Court's reversal of that decision. During that two-year interval, Barber was entirely free to re-erect the billboard, as the state appeals court had held the THBA unconstitutional as applied to it. But he did not. Because Barber voluntarily removed, and never replaced, the billboard in question, there is no live controversy for the Court to resolve.

For a plaintiff to have standing, an actual controversy must exist at all stages of the litigation, not merely at the time the complaint

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2. The Supreme Court of Texas rejected TxDOT's mootness argument without discussion. *See* Pet. App., at 7a. Although that court properly resolved the merits of the First Amendment issue, it should have determined that Barber's suit was moot, and mootness remains a barrier to this Court's jurisdiction.

is filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quotations omitted).

Barber's voluntary acts of removing his sign and then failing to replace it after the state court of appeals's decision rendered the litigation merely hypothetical. *See Arizonans for Official English*, 520 U.S., at 72 (recognizing that voluntary resignation from public sector employment mooted case). Lacking a current controversy, Barber's suit challenging the THBA rests instead on his assumed intention to put up the sign again, an assumption belied by his conduct during the two years after the court of appeals decision. Yet "[a]bstract injury is not enough . . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Past exposure to allegedly illegal conduct does not in itself show a present case or controversy. *Renne v. Geary*, 501 U.S. 312, 320-21 (1991); *O'Shea*, 414 U.S., at 494.

Barber argued below that his case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception, however, applies only in rare circumstances. To invoke the exception, a plaintiff must prove that (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; *and* (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Murphy*, 455 U.S., at 482 (emphasis added). A plaintiff must demonstrate that he meets both elements of the mootness-exception test. *Id.*, at 482 (observing that the "doctrine [is] limited to the situation where two elements are combined.").

Barber's suit cannot satisfy the first prerequisite of this exception because TxDOT's enforcement of the THBA was not too short in duration to be litigated fully before Barber removed his sign. Indeed, TxDOT had not even secured a judgment on its counterclaim to enforce the THBA when Barber removed the sign on his own initiative. App., at 2a-3a, 7a. In fact, in granting summary judgment on TxDOT's counterclaim, the district court had to strike through the portion of the order requiring Barber to remove the sign because he had already removed it. App., at 2a-3a. Rather than litigating his case fully, Barber voluntarily removed the sign and with it his sole basis for bringing suit. Therefore, even if Barber could satisfy the second prong of the mootness exception, he could not satisfy the first requirement, and so the exception cannot apply. *See Murphy*, 455 U.S., at 482. Because this case is moot by virtue of the petitioner's voluntary action of removing the sign, the Court should deny certiorari.

III. THE TEXAS SUPREME COURT'S DECISION WAS CORRECT.

Even if the Court were inclined to grant certiorari for the error-correction purpose to which the petition is on its face limited, this case would not be an appropriate candidate because it was correctly decided by the Supreme Court of Texas. As that court properly determined, the THBA is content-neutral, treating commercial and non-commercial speech equally. *See* Pet. App., at 17a-24a. Thus, as recognized by the court, it is subject to, and satisfies, intermediate scrutiny because it is narrowly tailored to serve the substantial state interests of highway safety and aesthetics. *See id.*, at 25a (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986)). Moreover, as the Texas Supreme Court concluded, it leaves open adequate alternative channels of communication, because Barber could arrange to erect his sign in an industrial or commercial area along the same highway. *See id.*, at 26a-29a.

The main concern advanced in the petition is that the THBA's exception for signs related to onsite activities, although facially neutral as between commercial and non-commercial speech, will *in practice* result in greater restrictions on non-commercial speech, which, Barber contends, is prohibited by the plurality opinion in *Metromedia*. *See* Pet., at 8-11. Thus, although the onsite-activity exception would allow a veterans organization to display a sign on its property stating, "Support Our Vietnam Veterans," and would allow a church to exclaim, "Praise God," just as it would permit a restaurant to advertise, "Eat at Joe's," Barber argues that this exception impermissibly favors commercial speech. Yet this appeal is not an appropriate vehicle to address Barber's concern, because he introduced no evidence that signs with non-commercial messages are less likely to fall under the onsite-activity exception than signs with commercial messages nor any evidence that the exception has had any discriminatory effect historically, despite the fact that the THBA has been in effect for over thirty years. The Court should decline to accept Barber's invitation to engage in presumptions concerning the alleged disparate impact of the onsite-activity exception when he failed to introduce any evidence supporting his disparate-impact contention.

Because the petition does not identify any weaknesses in the decision below that merit the Court's attention, the Court should deny certiorari.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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